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No. 982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PERRYTON WHOLESALE, INC., a Corporation,
Petitioner,

vs.

PIONEER DISTRIBUTING COMPANY OF KANSAS, INC., a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is reported in 353 F.2d 618.

STATUTES INVOLVED

A statute involved in addition to those stated by petitioner is 15 U.S.C. 26:

"Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except for the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737."

STATEMENT OF CASE

Respondent Pioneer was begun as an individual enterprise in 1946 in Wichita, Kansas, by Al Driscoll. It sold at wholesale non-food items to retail outlets. Being a new enterprise without financial resources, Pioneer was forced to compete with established wholesale houses, and

was able to do so by offering better service to retailers, including servicing goods sold and placing them on "racks" within the retail store. (P.R. 18-19; 94-96; 163-165; 141).

By offering better service, Pioneer expanded its area of business throughout Kansas, and in Colorado, Oklahoma and other states, by means of sales routes and shipments of its merchandise throughout such areas and across state lines. (P.R. 272, 273). Pioneer also held contracts with interstate manufacturers obligating it to sell and promote merchandise which was shipped from other states into Kansas, where it flowed through Pioneer's warehouse, to Pioneer's customers located in Kansas and the various states. (P.R. 216-217, 228).

Based on abundant evidence, the trial court, the Hon. Delmas C. Hill, found that petitioner conspired with a group of Pioneer's sales personnel who had charge of Western Kansas, Colorado and Oklahoma, to pirate and take over all of Pioneer's accounts in such interstate area. (P.R. 18-25). Petitioner's warehouse was in nearby Perryton, Texas.

The conspiracy was characterized by concealed and carefully laid plans to effect an overnight transfer of all accounts and all Pioneer salesmen in the area, to petitioner. The testimony of the conspirators in court consisted of impossible alibis that the members of the conspiracy happened to seek an "opening" for employment by petitioner. They were then granted an "opening" to work for petitioner by selling in their existing area to their existing Pioneer accounts—an area in which

petitioner had never sought to sell merchandise through its own salesmen in fair competition.

The conspiracy, directed at all of Pioneer's substantial accounts in the three state area mentioned above (P.R. 23-24), Findings XXVIII, XXIX, and XXX), caused irreparable and substantial damage, and had the object, as well as effect, of unreasonably restricting trade and commerce among such states, and otherwise damaged Pioneer's interstate business. Judge Hill enjoined the carrying out of the conspiracy, after the conspiracy had been partially successful in pirating a substantial number of accounts. (P.R. 25).

Thereafter, the trial court, the Hon. Wesley E. Brown, in a separate hearing fixed the amount of damages and costs to be awarded to respondent. (P.R. 63-69).

The Court of Appeals in a unanimous opinion affirmed.

ARGUMENT

The Opinion Below Is in Accord with Decisions of This Court, and Other Courts of Appeals, and Is Clearly Correct.

I. All damages caused by conspiracy violating Section 1 of the Sherman Act Are Recoverable under 15 U.S.C. 15.

The Court of Appeals, in holding petitioner's conspiracy in violation of Section 1 of the Sherman Act, applied and carried out the terms of the statute as interpreted by this Court. It also followed the decisions of

other Courts of Appeals in factually similar circumstances. See *Albert Pick-Barth Co., Inc.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1 Cir. 1932), cert. denied 286 U.S. 552; *Atlantic Heel Co., Inc.* v. *Allied Heel Co., Inc.*, 284 F.2d 879 (1 Cir. 1960).

The *object* of the conspiracy was to restrain many tens of thousands of dollars in sales to Pioneer buyers out of state, permanently, and to restrain hundreds of thousands of dollars in sales of merchandise which Pioneer purchased from interstate manufacturers, under continuing contractual commitments, which flowed through Pioneer's Kansas warehouse in a continual stream to customers in Kansas and other states. (See Pls. Ex. 10, P.R. 311-320, showing petitioner *actually* restrained $122,066.56 in such sales on sales to Pioneer accounts obtained by the conspiracy, in a period of about one year.) Had the conspiracy not been enjoined, and been completely successful, the total sales restrained would have been several times that amount.

Petitioner now tells this Court that because it was enjoined, and could not carry out its plans, Pioneer's interstate damages are not substantial, and that damage to local business is not recoverable. It then quotes figures to this Court, *not of sales restrained*, but of a conservative estimate of a margin of profit on some sales on which the trial court computed actual damages.

Petitioner also ignores the district court findings that Pioneer's interstate purchases, shipped to local Kansas retailers, were a part of Pioneer's interstate business.

Countless decisions of this Court and other courts hold such damages caused by a conspiracy violating the

Sherman Act recoverable under 15 U.S.C. 15, whether the damage is suffered locally, or in another state. Justice Holmes put the matter at rest by holding, in *Chattanooga Foundry & P. Works* v. *Atlanta*, 203 U.S. 390, 396-397 (1906):

> ". . . There can be no doubt that Congress had the power to give an action for damages to an individual who suffers by breach of the law. . . . The damage complained of must almost or quite always be a damage in property, that is, in the money of the plaintiff, which is owned within some particular state. In other words, *if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one state.*" (Our emphasis)

Destruction of local business, no matter how small, violates the Sherman Act when it interferes with the natural flow of interstate commerce. *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); *Radiant Burners* v. *Peoples Gas L. & Coke Co.*, 364 U.S. 656 (1961); *Bigelow* v. *RKO Pictures*, 327 U.S. 251, 266 (1946); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225 (1947); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 485 (1940); *North Texas Producers Association* v. *Young*, 308 F.2d 235 (5 Cir. 1962), cert. denied 372 U.S. 979; *Union Carbide and Carbon Corporation* v. *Nisley*, 300 F.2d 561, 585 (10 Cir. 1961), cert. dismissed sub nom. *Wade* v. *Union Carbide and Carbon Corporation*, 371 U.S. 801; *United States* v. *Standard Oil Company*, 316 F.2d 884 (7 Cir. 1963); *United States* v. *Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7 Cir. 1961); and many other decisions cited therein.

II. Petitioner's counterclaim that respondent entered into illegal contracts with customers is without foundation.

Once petitioner's conspiracy was discovered, and after depositions were taken in the trial court disclosing the conspiracy, petitioner amended its answer to include a counterclaim. (P.R. 12). The counterclaim alleged that Pioneer's fixture lease agreements with customers violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. No claim was then made that the agreement violated state law. (P.R. 11, 12).

Pioneer leased certain fixtures to various customers for the appropriate display of merchandise sold by Pioneer, and customers therein agreed not to use that *fixture* for purposes other than sale and display of merchandise sold by Pioneer. (P.R. 15). This was the current contract used by Pioneer, and as pointed out by the Court of Appeals, 353 F.2d at 624, this contract did not prevent the retailer from selling or dealing in the same goods furnished by others, so long as the leased fixture was not itself used. Such agreements are valid under the principles of *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U.S. 463, 474 (1923), and *Standard Oil Co. of Cal. and Standard Stations* v. *United States*, 337 U.S. 293, 303 (1949).

The contract form attached as Exhibit "A" to the counterclaim (P.R. 13), was an older form used on some undisclosed accounts for an undisclosed time, superseded by the newer form as above described. (P.R. 23; 133). It applied only to drugs and cosmetics (only a small part

of Pioneer's business). It apparently required the customer not to sell, display or dispose of drugs and cosmetics during the one year term of the agreement, although, the subject of the agreement being the fixture supplied for displaying such drugs, it can be interpreted to apply only to the fixture which is the subject of the agreement. So construed, it is the same type of agreement currently in use by Pioneer.

If it is a true exclusive dealing contract, Exhibit "B" could be illegal only "where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be *to substantially lessen competition or tend to create a monopoly in any line of commerce.*" (15 U.S.C. 14, Section 3 of the Clayton Act.) (Our emphasis) See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 335 (1961).

The Court of Appeals correctly noted this requires "proof that competition has been foreclosed in a substantial share of the line of commerce affected." (353 F.2d at 624). The trial court's findings, approved by the Court of Appeals, were that Pioneer supplied about 5% of the total volume of items which it handled in the pertinent areas, an unsubstantial amount. Further, Exhibit "A" itself applied only to a small undisclosed number of such accounts, and applied only to drugs and cosmetics.

Petitioner cannot escape the total lack of proof of elements required to establish illegality of Exhibit "A". Moreover, petitioner's assertion that Pioneer was a "monopolist" in "rack-jobbing", is not only without evidence,

but is contrary to the express findings of the trial court, duly approved and affirmed by the Court of Appeals.

The truth, as already stated, is that Pioneer had 5% of the business, and that it obtained such business by open competition with old, established wholesalers, many of whom tasted real competition for the first time. To pursue that type of competition against established wholesalers, Pioneer gave better service, called regularly on accounts, gave advice concerning currently best-selling items, and obtained sources for such items from manufacturers throughout the United States.

To call Pioneer a monopolist because, in selling identical merchandise sold to the same accounts by competitive wholesalers, it renders additional service in order to compete with a local wholesaler, is misleading, to say the least. Petitioner's waving this red flag, we trust, will not obscure the true facts nor the findings below. These findings are in no way impeached by isolated statements in the record quoted by petitioner, which indicate that Mr. Driscoll, Pioneer's founder, was quite proud of an organization he built from nothing by competing in a market with long-established firms.

Petitioner's present assertion that Pioneer's customer contracts violated Kansas law is unavailable for review because not asserted in the district court. Even so, the claim is irrelevant, and contrary to the Kansas decisions construing the statutes cited by petitioner.[1]

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1. *Southwest Kansas Oil & G. Co.* v. *Argus P.L. Co.*, 141 Kan. 287, 39 P.2d 906 (1935); *Sage* v. *Oil County Specialties Mfg. Co.*, 134 Kan. 215, 5 P.2d 1091 (1931).

III. Relevant market question.

As already noted, petitioner's claim that the relevant market does not include sale by competitive wholesalers and other competitors on the wholesale level, of identical and comparable non-food products, is contrary to the evidence and findings below. (See Pls. Ex. 8, Exhibit Booklet, a partial list including over 80 competitors of Pioneer in this area; Finding IV, P.R. 18.) See *Tampa Electric Co.* v. *Nashville Coal Co.*, supra; and *United States* v. *Continental Can Co.*, 378 U.S. 441, 457 (1964), holding that the line of commerce must conform to "competitive reality."

CONCLUSION

No valid reason exists for review by this Court of the decision below. The opinion follows, and is in complete accord with, governing decisions by this Court, and is consistent with many other decisions by Courts of Appeals for other circuits.

The lower court's factual findings contested by petitioner, especially as they relate to petitioner's counterclaim, are supported by ample and abundant evidence. There is, in fact, no substantial evidence to support petitioner's present claims.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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